Kelly-Goodwin Hardwood Company, a Division of Pankratz Forest Industries, Inc. *and* Teamsters Local Union No. 174, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 19-CA-13340

7 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 2 December 1982 Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not lawfully lock out bargaining unit employees Alfred Galliano and Terry Swenson but, rather, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging them to evade its obligations under its collective-bargaining agreement with the Union and also to establish a nonunion operation. In addition, the judge found that the Respondent violated Section 8(a)(1) of the Act by paying the employees it hired to replace Galliano and Swenson more than it had offered in its last proposal to the Union to pay Swenson prior to dismissing him.

In its exceptions, the Respondent contends that the judge, in concluding that it discriminatorily discharged Galliano and Swenson, decided a question the complaint did not raise and the parties did not litigate at the hearing, and that its conduct did not violate the Act as alleged in the complaint. The Respondent also contends that the judge erred by failing to find that the amended charge underlying the complaint was time-barred by Section 10(b) of the Act.

The issue the complaint raises and the parties litigated at the hearing involves the Respondent's alleged discriminatory utilization of replacements for its locked-out bargaining unit employees, Galliano and Swenson. Accordingly, we agree with the Respondent that the judge addressed a question that was never at issue in this proceeding. We find, nevertheless, that the Respondent's conduct did violate the Act. Consistent with the complaint, the litigation, and the proof, rather than finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Galliano and Swenson, we find, for the reasons stated, that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily replacing Galliano and Swenson on a permanent basis, after it had locked them out.[1] As explained more fully below, we also reject the Respondent's affirmative defense that Section 10(b) of the Act requires that the complaint be dismissed.

The facts as found by the judge and amplified by undisputed record evidence are as follows.[2]

I.

The Respondent, a hardwood flooring and related products wholesale distributor, operates two warehouse facilities, one in Seattle, Washington, and the other in Portland, Oregon. Only the Seattle facility is relevant to this proceeding. A series of collective-bargaining agreements between the Respondent and Local 174 (the Union) has covered the drivers and warehousemen employed at this location for a number of years.[3]

The last collective-bargaining agreement the parties actually executed was a standard area agreement for the period 1 April 1977 through 31 March 1980, subject to automatic renewal from year to year thereafter. Absent a mutual agreement to the contrary, the parties could forestall automatic renewal of the 1977–1980 agreement, or any later one effectuated through automatic renewal, only by giving written notice 60 to 90 days prior to the expiration date. Since neither party contends that it gave the other written notice of termination at any time prior to early 1982, or that an alternative method of termination was ever agreed upon, there is no question but that, through automatic renewal, a valid collective-bargaining agreement was in effect on 2 March 1981, the date the Respondent

[1] The General Counsel also alleges as a violation of Sec. 8(a)(3) and (1) of the Act the Respondent's payment of higher wages and benefits to the replacements than the level of wages and benefits it offered during contract negotiations to pay Swenson. The judge, as previously noted, found that the Respondent's conduct violated Sec. 8(a)(1). In view of our finding that the Respondent's utilization of permanent replacements was itself discriminatory, we find it unnecessary to reach the issues the General Counsel's additional allegations raise.

[2] In sec. II,A of his decision, par. 16, the judge found that the Respondent's president advised Galliano and Swenson, when they reported to work on 2 March 1981, that "their services were no longer desired or required." There is no support in the record for this finding. Accordingly, in concluding that the Respondent discriminatorily operated with replacements, we do not rely on this finding.

[3] Local 162 represents a similar bargaining unit at the Respondent's Portland warehouse.

locked out and replaced its bargaining unit employees.[4]

Also included in the 1977–1980 collective-bargaining agreement was a provision which permitted either party to open the contract, or a renewal contract, for the purpose of negotiating alterations in wages and other terms and conditions of employment.[5] Accordingly, in December 1979, the Union notified the Respondent pursuant to the provision, and opened the contract for negotiations. Several months earlier the Respondent's president, John R. Pankratz, had met with the Union's business agent, Ted Keyes, to discuss some of the Respondent's economic problems. At the meeting, Pankratz informed Keyes that the general downturn in the construction and timber industries, along with the ability of the Respondent's primary competitor, a nonunion company, to undercut its prices, was having a serious, adverse effect on the Respondent's financial condition.[6] After investigating the matter, Keyes notified the Respondent and the Federal Mediation and Conciliation Service that it was opening the contract for negotiations.

The first bargaining session between the parties did not occur until 22 October 1980.[7] Initially, the Union requested increased wages and fringe benefits. The Respondent formally replied in a letter to the Union dated 7 November. The Respondent offered to maintain the existing contractual wages and fringe benefits of its three union-represented employees, provided that the Union would agree to amend the contract to permit it to utilize employees other than bargaining unit employees to perform bargaining unit work.[8]

Following discussions between the parties, the Respondent made a second proposal in a letter dated 26 November, offering to increase pension fund contributions by 7 cents per hour beginning 1 April 1981, in addition to maintaining wages and fringe benefits, again provided that the Respondent would not be limited to using bargaining unit employees to perform bargaining unit work. Regarding the latter part of its proposal, the Respondent specifically offered the following:

> That notwithstanding any contrary provision(s) in the existing labor agreement with Teamsters Local 174, Kelly-Goodwin shall be free to utilize its non-union employees to perform any warehouse, loading, unloading, truck driving and related services, provided that before any one of the three present Teamsters Local 174 employees are laid off or terminated (except for cause), and before any of those three teamster union positions are eliminated, Kelly-Goodwin shall first cease using non-union personnel to perform heretofore union tasks.

The employees immediately rejected the Respondent's offer and authorized the Union to call a strike, if and when it deemed such action appropriate. On 4 December the Respondent wrote the Union a letter demanding, among other things, confirmation of the strike vote, and indicating that it could not operate while under the constant threat of a surprise strike.

On 24 December the Respondent again wrote the Union. This letter informed the labor organization that adverse business conditions persisted and that it would therefore have to lay off certain employees, including Terry Swenson, the least senior of the three bargaining unit employees. As to what effect the layoff would have on the remaining members of the bargaining unit, the Respondent noted:

> [T]he effective 1/3 reduction in our warehouse and truck driving staff through the layoff of Mr. Swenson makes it a practical necessity that the company's non-union employees occasionally perform heretofore union work. . . . The company will be operating with a bare minimum skeleton compliment [sic] of employees, each of whom will of necessity be called upon to perform a wider range of duties, some

[4] In early 1982 the Respondent notified the Union of its intent to terminate the contract and, by its terms, the contract terminated on 31 March 1982.

[5] The complete text of this provision states:

> [F]or the purpose of negotiating alterations in wages and other terms and conditions of employment, either party may open this Agreement or any contract effectuated through automatic renewal by giving written "Notice of Opening" not later than sixty (60) days prior to the expiration date. "Notice of Opening" is in nowise [sic] intended by the parties as a termination of nor shall it in anywise [sic] be construed as a termination of this Agreement or any annual contract effectuated through automatic renewal nor as forestalling automatic renewal as herein provided. The parties reserve the right to economic recourse in negotiations, except during the interval between the giving of Notice of Opening and the expiration date.
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> . . . .
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> Any "Notice of Opening" or "Notice of Termination" given within sixty (60) days of any expiration date shall be absolutely null and void and completely ineffective for all purposes.

[6] According to the Respondent, this particular competitor was paying its three nonunion warehousemen/drivers a wage and benefit package believed to be about $7 per hour, whereas it was paying its three, similar union-represented employees a wage and benefit package of about $15 per hour.

[7] Other meetings were held on 27 October and 20 November 1980, and on 17 February 1981.

All subsequent dates are in 1980, unless otherwise indicated.

[8] Sec. 9.01 of the collective-bargaining agreement provided that "[t]he work of Local No. 174's bargaining unit must be performed only by employees belonging to said unit."

of which duties were previously performed by persons now being laid off.

The Respondent also included in the letter a "new" proposal which offered a "moratorium" on further negotiations through 31 March 1982, and acceptance of the current wage and benefit scale through that date, if the Union would agree to modify the existing agreement to allow the Respondent to assign unit work to nonunit employees. The Respondent gave the Union until the close of business on 2 January 1981 to accept its "demand and final offer," noting that, afterwards, it would unilaterally implement the proposal's terms.

On 26 December the Respondent laid off Swenson.[9] According to Pankratz, around that time the Respondent also began a practice of occasionally utilizing nonunit employees in the warehouse to perform unit work. Keyes complained to Pankratz that this practice of the Respondent violated section 9.01 of the parties' collective-bargaining agreement, and filed a grievance concerning it.[10]

The final negotiations between the parties occurred in February 1981. On 10 February the Respondent wrote the Union a letter outlining certain changes in its bargaining position. It offered, in pertinent part, to designate its longtime employee Alfred Galliano as "leadman," to maintain his wages and fringe benefits at their current levels (about $15 per hour, benefits included), and to eliminate the "leadman" classification on Galliano's voluntary termination, retirement, or termination for cause, provided that the parties reached agreement on certain contract language (presumably sec. 9.01). All other unit employees, including Swenson who, by the Respondent's estimate was then earning approximately $15 per hour in wages and fringe benefits, would receive a package totaling $7 per hour beginning 1 March 1981, and continuing thereafter for 3 years. "The plain fact," the Respondent explained in its letter, "is that Kelly-Goodwin cannot continue to suffer the competitive disadvantage of paying double the amount paid by our non-union competition for identical warehouse and truck driving services."

The parties met on 17 February 1981, although to no avail. The Union agreed at that time to accept the Respondent's earlier proposal to extend the existing agreement's terms through 31 March 1982, a fait accompli in any event since, by that time, the contract's automatic renewal for another year could not have been forestalled. According to Keyes, the Respondent never moved from its last offer of $7 per hour, including wages and fringe benefits, for Swenson and all new hirees.[11] The Respondent contended that it made concessions, such as agreeing to maintain Swenson's wages and benefits for 2 to 3 months, but that the Union refused to discuss any changes in the contract if they were to have an effect at any time before 1 April 1982.

Consequently, by letter dated 19 February 1981, the Respondent informed the Union that they had reached an impasse and that, effective 2 March 1981, it would implement the reclassification of wages as set forth in its letter of 10 February, noting again that it could not continue "to suffer the competitive disadvantage" caused by the existing wage structure. Responding to an earlier union contention that the Respondent was precluded by their collective-bargaining agreement from going forward as planned, the Respondent asserted that the Union had misinterpreted the parties' contract. Thus, according to the Respondent:

> The referenced contract expressly reserves to each party the right to economic recourse in negotiations, which right you doubtless relied upon in taking a strike vote and advising us that we could expect a surprise strike at any time. Although less severe than a strike or an exercise of our corollary right to lock out, the reclassification of wages is an entirely legitimate exercise of our right to economic recourse in negotiations under the present circumstances.

In a telephone conversation on 27 February 1981, Pankratz and Keyes made an unsuccessful last-minute attempt to reach an agreement. On 2 March 1981, the day on which the Respondent's threatened unilateral contract modifications were scheduled to go into effect, the Respondent elected instead to lock out its two unit employees, Galliano and Swenson, and to replace them with three employees it had standing by and ready to work.[12] The Respondent paid the replacements it hired that day $6.80, $7.25, and $8 per hour, respectively, plus fringe benefits.[13]

[9] Swenson was recalled in January 1981 to replace one of the two remaining bargaining unit employees who had subsequently left the Company.

[10] Keyes testified that, rather than following through on the grievance, the Union "just set it aside."

[11] The record shows that, at some point during the negotiations, the Union suggested the possibility of substituting its area standard Lumber-Buildings Material Agreement in which the labor costs were approximately $1 per hour less than those contained in the parties' Private Carrier Agreement.

[12] The following day the Respondent hired a fourth replacement.

[13] The parties stipulated at the hearing that the value assigned to the fringe benefits replacements received was equal to a fixed percentage of the individual's wage rate, and that the fringe benefits on a wage rate of $6.90 per hour would be worth 39 cents per hour.

On 11 March 1981 the Union sent the Respondent a mailgram stating that the Respondent had locked out Galliano and Swenson in violation of a valid and existing collective-bargaining agreement, and making, on behalf of the locked-out unit employees, an unequivocal offer to return to work. In a letter to the Union dated the following day, Pankratz disputed the Union's contention that the Respondent was somehow in violation of a collective-bargaining agreement, and averred that the lockout's sole purpose was to induce further good-faith bargaining.

Since the lockout on 2 March 1981 the Respondent has employed, at one time or another, 15 different replacements. This does not include Pankratz' son who, the parties stipulated, has performed unit and other work on a part-time basis.[14] At all times during this period the Respondent has had more than two replacements on its payroll at an hourly wage rate of between $6 and $8 per hour. At the time of the hearing neither Galliano nor Swenson had been recalled.

II.

On 12 March 1981 the Union filed an unfair labor practice charge with the Board, alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by engaging in the following conduct:

> Within the past six months the above employer has repudiated a valid and existing collective bargaining agreement between the employer and General Teamsters Local 174 in a unit appropriate for bargaining and it has made unilateral changes in wages, hours and working conditions in violation of the collective bargaining agreement and in addition has locked out its two employees covered by said agreement.

On 9 September 1981 the Union filed the following amendment to the original, timely filed charge, alleging that the Respondent had violated Section 8(a)(3) and (1) of the Act as well:

> Also during the past six months, the above employer has hired temporary replacements for the locked out unit employees described above, and provided these replacements with wage and benefit packages in excess of the employer's last offer to the Union.

Thereafter, on 27 October 1981, the General Counsel issued the instant complaint, alleging that the Respondent, by the following conduct, violated Section 8(a)(3) and (1) of the Act:

> [8](a) Commencing on or about March 2, 1981, and continuing to date, Respondent has utilized replacements to perform the work tasks of the unit employees who were locked out.
>
> [8](b) Commencing on or about March 2, 1981, and continuing to date, Respondent has provided the replacements described in subparagraph (a) with a higher wage rate than Respondent's last offer made during the collective bargaining negotiations described above in paragraph 5.

The following day, the Union requested that the original portion of the charge be withdrawn and, 2 days later, the General Counsel approved the Union's request.

The Respondent contends that the Union first challenged the hiring of temporary replacements for locked-out unit employees in the amended charge filed on 9 September 1981, and, because the alleged conduct occurred on 2 March 1981, more than 6 months before the amended charge was filed, the General Counsel was precluded by Section 10(b) of the Act from issuing a complaint based entirely on this conduct.[15] The Respondent takes the position that the amended charge, which alleges a violation of Section 8(a)(3) and (1), cannot, for 10(b) purposes, relate back to the original, timely filed 8(a)(5) and (1) allegations, which the Union later withdrew. This is so, the Respondent asserts, because the amended charge is not really an amendment at all; rather, it is a new and entirely different type of charge. Nor can the allegations in the original charge, the Respondent contends, be deemed to encompass those subsequently alleged, because there is no indication in the original charge that the Union is alleging, in essence, violations of Section 8(a)(3) and (1), as well as of 8(a)(5) and (1).

The Respondent's argument is addressed only to the validity of the complaint under Section 10(b) of the Act, and raises no question of unfairness with respect to the preparation and litigation of its case.[16] Accordingly, the single question is whether the General Counsel, in these circumstances, properly issued a complaint on the basis of conduct alleged in an amended charge filed more than 6 months from the date the conduct allegedly occurred.

It is well settled that the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge

[14] He was paid at the rate of $8 per hour.

[15] Sec. 10(b) of the Act provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge."

[16] See *National Licorice Co. v. NLRB*, 309 U.S. 350, 368 (1940).

which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge.[17] Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge. This practice is wholly consistent with the statutory scheme, which establishes the charge merely as a vehicle for setting in motion the Board's investigatory machinery and, additionally, affords the Board leeway to issue a complaint on grounds other than those specifically set forth in the charge.[18]

In the instant case, the original, timely filed charge alleges, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by locking out its two bargaining unit employees and making unilateral changes in wages, hours, and working conditions in violation of a valid and existing collective-bargaining agreement. The amended charge alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by hiring individuals to replace temporarily the locked-out unit employees, and by compensating the replacements at a discriminatory rate. The record shows that the lockout and the hiring of replacements occurred simultaneously on 2 March 1981. The record further shows that the basis for the allegation in the original charge that the Respondent violated the parties' collective-bargaining agreement stemmed, in part, from the Respondent's failure to remunerate the unit employees' replacements with wages commensurate with those set forth in the agreement.

In these circumstances, the matters alleged in both the original and amended charges are more than just related; they are virtually inseparable. That the original portion of the charge ultimately was withdrawn is of no consequence, because the additional allegations had already been filed. Accordingly, as the amended charge alleges matters similar to, and arising out of the same course of conduct, as those alleged in the original charge, we find that the time limitation imposed by Section 10(b) of the Act did not preclude the General Counsel from issuing the complaint in this case.

III.

On the merits, the judge concluded that the Respondent discharged Galliano and Swenson in violation of Section 8(a)(3) and (1) of the Act. The judge (in sec. II,B,2, par. 2 of his decision) explained that:

> [T]he Company dismissed Galliano and Swenson and simultaneously hired new employees to perform their work to rid itself of the obligation to pay its veteran union-supporting help the wage rates and benefits to which they were entitled under the extended agreement, any necessity to continue dealing with Local 174 as their representative, and in order to establish a non-union operation at far lower scales than those it was required to pay through March 31, 1982 under the union agreement.

Before reaching his conclusion, the judge considered and summarily rejected the possibility that the Respondent lawfully locked out Galliano and Swenson on 2 March 1981, and operated thereafter with temporary replacements. The evidence, he found, did not support the theory that the Respondent locked out its bargaining unit employees but, on the contrary, clearly demonstrated that they had been discharged. The Respondent points out in its exceptions, however, that the legality of the lockout was never in dispute. The focus of the litigation, the Respondent contends, was much more limited in that it centered only on its use of replacements for the locked-out employees and on how much it had paid them compared to what it had last proposed to the Union to pay Galliano and Swenson.[19]

To clarify the matter, it is necessary first to examine the complaint. Two clear and distinct issues are raised by paragraphs 8(a) and (b).[20] The first issue, the one with which we are primarily concerned, involves the Respondent's utilization of replacements to perform the bargaining unit work of the two unit employees who were locked out. The second issue involves a comparison, allegedly unfavorable to the Union, between the wage and benefit package the replacements received and that which the Respondent included in its last offer to the Union during contract negotiations. Neither issue encompasses the question of whether the Respondent violated Section 8(a)(3) and (1) of the Act by locking out its bargaining unit employees. None of the parties raised this question at any time. Indeed, from the sense of the record it would appear that the counsel for the General Counsel

[17] See *Michigan Consolidated Gas Co.*, 261 NLRB 555 fn. 1 (1962). Cf. *Allied Industrial Workers Local 594 (Warren Molded Plastics)*, 227 NLRB 1541 (1977) (original and amended charges alleged distinct and separate violations).

[18] See *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959); *Texas Industries v. NLRB*, 336 F.2d 128 (5th Cir. 1964); *Great Plains Steel Corp.*, 183 NLRB 968, 974–975 (1970).

[19] The General Counsel's cross-exceptions are at least implicitly consistent with the Respondent's position in this regard, inasmuch as his principal exception is to the judge's failure to include in his decision the finding that he would have reached the same conclusion "even if Respondent had legally locked out the two unit employees on March 2, 1981."

[20] These paragraphs are set forth in sec. II above.

implicitly conceded that the lockout was legitimate, rather than merely an unlawful pretext, because he made repeated reference to "the lockout" and to individuals whom he called "temporary replacements." Accordingly, we agree with the Respondent that the judge improperly went beyond the scope of both the complaint and the litigation in considering the lockout's legality, finding that it was unlawful, and concluding that Galliano and Swenson had not been locked out on 2 March 1981 but, rather, had been discharged. In reviewing the record in this case, we must therefore assume, arguendo, that the lockout on 2 March 1981 was lawful.

As a practical matter, however, both the issue the judge decided and the one the parties actually litigated, i.e., whether the Respondent violated the Act by hiring replacements for locked-out employees Galliano and Swenson, are closely related and turn on virtually identical facts. Thus, after reviewing these facts in their proper legal context, they convince us, as they did the judge, that the Respondent's conduct vis-a-vis Galliano and Swenson violated the Act. Unlike the judge, however, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by replacing Galliano and Swenson for a discriminatory purpose, rather than by dismissing them.[21]

It is not a violation of Section 8(a)(3) and (1) of the Act, per se, for an employer to lock out employees and to continue operating with temporary replacements.[22] Such conduct clearly is unlawful, however, if it is motivated by antiunion considerations.[23] Having carefully examined the record, we are convinced that the Respondent was motivated by just such considerations.

The Respondent demonstrated by its entire course of conduct that it had no intention whatsoever of allowing any provision in its collective-bargaining agreement, which it considered onerous, to restrict it in its ability to compete effectively with its nonunion competitor. When, for example, the Union refused to agree to its repeated requests to delete section 9.01 of the collective-bargaining agreement, which prohibited the Respondent from assigning bargaining unit work to nonbargaining unit employees, the Respondent simply ignored the provision and proceeded to make the contractually prohibited assignments even though the agreement was still in effect.

After removing section 9.01 as an impediment, the Respondent focused on labor costs. Thus, the Respondent's initial offer to the Union, while section 9.01 was still a factor, was to maintain wages and benefits at their existing levels in return for a concession on section 9.01. Afterwards, however, the Respondent drastically changed its position. In its letter of 10 February 1981, it informed the Union that it could no longer "suffer the competitive disadvantage" of paying warehouse and truck-driving employees twice what its nonunion competition was paying for similar services. Therefore, it proposed a major restructuring of wage and benefit levels, which included, inter alia, a cut of approximately 50 percent, effective 1 March 1981, in the wage and benefit package of one of its two unit employees.

At one point thereafter, the Union suggested that it might be willing to substitute a different area agreement for the parties' existing contract, but the Respondent apparently had no interest in such a compromise. Instead, on 19 February 1981, the Respondent wrote the Union to inform it once again that it was about to take unilateral action. This time, the Respondent threatened to cut Swenson's wages and benefits approximately in half effective 2 March 1981, while maintaining those of Galliano for the remainder of his tenure with the Company by establishing a special "leadman" classification solely for him.[24]

On 2 March 1981 the Respondent did not, as it previously had threatened, take any unilateral action with respect to the wages and benefits of either Swenson or Galliano. Rather, when they arrived at work, Pankratz told Galliano and Swenson that the Company was locking them out, and immediately put other employees to work in their place, at a fraction of their pay.[25]

That the Respondent's reasons for operating with replacements after the 2 March 1981 lockout were discriminatory is further evidenced by the Respondent's conduct on and after that date. The

[21] Having concluded that the Respondent violated Sec. 8(a)(3) and (1) of the Act, we find it unnecessary to pass on the issue raised by par. 8(b) of the complaint concerning the comparison between the wages and benefits paid the replacements and the last wage and benefit proposal the Respondent offered to the Union during negotiations, as noted in fn. 1 above.

[22] *NLRB v. Brown Food Stores*, 380 U.S. 278 (1965); *Ottawa Silica Co.*, 197 NLRB 449 (1972), enfd. 482 F.2d 945 (6th Cir. 1973).

[23] See cases cited above in fn. 22.

[24] In defense of its right to pursue this action, the Respondent cited the labor agreement itself which, it noted, expressly reserved to each party "the right to economic recourse in negotiations." Yet nothing in the contract, or the record for that matter, indicates that the parties intended to imbue the term "economic recourse" with any meaning other than its ordinary one, namely, a strike or a lockout.

[25] Chairman Dotson and Member Hunter note that, in their view, if a collective-bargaining agreement contains a midterm, wage reopener provision, the employer may, absent any indication in the contract to the contrary, unilaterally modify wages and benefits following a genuine impasse in negotiations. They find, however, that this principle cannot be applied in the instant case because the record evidence plainly shows that the Respondent unilaterally reduced wages and benefits below contract levels for purely discriminatory reasons.

record is conspicuously devoid of any evidence that the Respondent ever informed either the Union, Galliano, or Swenson that it intended to utilize replacements only for the duration of the labor dispute. Moreover, nothing in the record shows that the Respondent made any statement, drafted any document, or took any action which could be interpreted consistently with an intent on the Respondent's part to replace Galliano and Swenson on anything less than an indefinite basis.[26] Although Pankratz testified that the replacements were hired "one day at a time" and "until such time as we could bring the others back," the objective evidence in this case points to a contrary conclusion.

The Respondent never offered to explain to the Union on what terms it would accept Galliano and Swenson back. Further, it ignored completely the Union's unequivocal offer on their behalf to return to work. And, when employees who were hired to replace Galliano and Swenson left its employ, the Respondent still made no attempt to contact either its locked-out employees or their bargaining representative. Instead, it just hired new replacements. At last count, according to the Respondent's own record, it had employed a total of 15 different individuals at one time or another to perform the work Galliano and Swenson previously performed. Finally, it is undisputed that not 1 of these 15 replacements received from the Respondent a wage and benefit package even approaching the $15-per-hour package Galliano and Swenson previously received under the parties' labor agreement, which continued in effect until 31 March 1982, and which the Respondent elected to ignore completely.

As previously discussed, the lockout of bargaining unit employees Galliano and Swenson is not an issue in this case because we are constrained by the complaint and the litigation to assume, arguendo, that the lockout was a lawful one and not a pretext for unlawful discharges. Thus, the only question for us to decide is whether the Respondent discriminatorily operated with replacements for Galliano and Swenson after it had locked them out. Based on the foregoing, and the record as a whole, and contrary to the Respondent's contention, we find that the Respondent hired employees to replace Galliano and Swenson on a permanent, rather than a temporary, basis. Further, we find that, in so doing, the Respondent was motivated solely by its desire to avoid its obligations under a valid and existing collective-bargaining agreement and to sever completely its relationship with the Union. Accordingly, we conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily operating with permanent replacements after locking out its bargaining unit employees.[27]

[26] Compare *Inter-Collegiate Press v. NLRB*, 486 F.2d 837 (8th Cir. 1973), wherein the employer informed both the union and its locked-out employees that it would utilize replacements only while the labor dispute continued and, in any event, not past a specified date.

CONCLUSIONS OF LAW

By permanently replacing its bargaining unit employees for discriminatory purposes after the lockout of 2 March 1981, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing bargaining unit employees Alfred Galliano and Terry Swenson for discriminatory purposes, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall offer Alfred Galliano and Terry Swenson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges previously enjoyed, dismissing, if necessary, any replacements hired in their stead. In addition, the Respondent shall make Alfred Galliano and Terry Swenson whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[28]

ORDER

The National Labor Relations Board orders that the Respondent, Kelly-Goodwin Hardwood Company, a Division of Pankratz Forest Industries, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Teamsters Local Union No. 174, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organi-

[27] Inasmuch as this finding is predicated entirely on evidence of the Respondent's unlawful motivation, Chairman Dotson and Member Hunter find it unnecessary to reach the issue of whether continued operations following a lockout with permanent, as opposed to temporary, replacements is inherently destructive of employees' rights.

[28] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

zation, by discriminatorily permanently replacing employees after a lockout.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Alfred Galliano and Terry Swenson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing their replacements, if necessary.

(b) Make Alfred Galliano and Terry Swenson whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them in the manner provided for in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Seattle, Washington, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[29] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage our employees' membership in Teamsters Local Union No. 174, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily permanently replacing employees after a lockout.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Alfred Galliano and Terry Swenson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, their replacements.

WE WILL make Alfred Galliano and Terry Swenson whole for any loss of earnings or other benefits they may have suffered as a result of the discrimination against them.

KELLY-GOODWIN HARDWOOD COMPANY, A DIVISION OF PANKRATZ FOREST INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On July 1, 1982, I conducted a hearing at Seattle, Washington, to try issues raised by a complaint issued on October 27, 1981, based on a charge filed by Local 174 on March 12 and amended on September 9.

The complaint alleges the Company violated the National Labor Relations Act, as amended, by its March replacement of its employees represented by Local 174 (and covered by a current agreement between the Company and Local 174) by nonunion employees at lower pay and conditions. The complaint also alleges the Company violated the Act by paying the new hires higher wages than those contained in its last wage offer during preceding negotiations.

The Company moved to dismiss the complaint on the ground the original (March 12) charge filed by Local 174 failed to allege the above-stated conduct as a claimed violation of the Act and the amended (September 9)

charge so alleging was filed more than 6 months after the date it allegedly engaged in that conduct, an untimely filing under Section 10(b) of the Act.

As to the merits of the complaint, the Company contended that the March replacement of its Local 174-represented employees by nonunion employees followed an impasse in negotiations, uncertainty over whether and when Local 174 might call its Local 174-represented employees out on strike, and to pressure Local 174 to modify its demands, therefore constituting a lawful lockout not violative of the Act; the Company further denied the new employees hired to replace its Local 174-represented employees were paid higher wages than those it offered in negotiations prior to the replacements and, in any event, asserted they were paid less than the employees they replaced.

The issues for determination are: (1) whether the complaint should be dismissed on the ground the underlying charges were untimely filed under Section 10(b) of the Act; (2) if not, whether the Company violated the Act by replacing its Local 174-represented employees covered by a currently effective agreement with nonunion employees at wage scales below those set out in the contract; and (3) whether the Company paid its newly hired replacements higher wages than those contained in its last wage offer during the negotiations immediately preceding the replacements and thereby violated the Act.

The parties appeared by counsel at the hearing and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs were filed by the General Counsel and the Company.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs, and research, I enter the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find at all pertinent times the Company was an employer engaged in commerce in a business affecting commerce and Local 174 was a labor organization within the meanng of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Company at all pertinent times was engaged in the business of selling and distributing hardwood flooring and related products at wholesale prices in the Seattle area. Either the Company or other divisions of Pankratz Forest Industries were engaged in the same business in Portland, Oregon, and elsewhere. Drivers and warehousemen were employed at both the Seattle and Portland operations. Local 174 represented the Seattle drivers and warehousemen for many years, as did Teamsters Local 162 at Portland. A continuous series of collective-bargaining agreements covered the Teamsters-represented employees at both locations.

This dispute involves the Seattle drivers and warehousemen. The last agreement executed by the Company and Local 174 covering them was signed on November 8, 1977, for a 3-year term extending from April 1, 1977, through March 31, 1980.[1] The agreement provided it automatically would be extended for 1- year periods following March 31, 1980, unless one of the parties terminated it by service of a notice on the other between 60–90 days prior to March 31, 1980, or a subsequent anniversary date. The agreement also provided: "The parties reserve the right to economic recourse in negotiations, except during the interval between the giving of Notice to Opening and the expiration date." Immediately prior to March 31, 1980, the Company employed three drivers and warehousemen (one was primarily a warehouseman, but also drove various company vehicles in making pickups and deliveries; the other two were primarily drivers, but also performed warehouse work as needed). The senior employee was paid $11.23 per hour and his two juniors were paid $11.09 per hour; the senior employee received 5 weeks of paid vacation per year and the other two in excess of 2 weeeks of paid vacation per year (depending on length of service); all three received paid sick leave, earned at the rate of 3-1/3 hours per month, to a maximum accrual of 420 hours; Company-paid hospital, surgical, medical, dental and vision benefits; Company-paid pension benefits; a guaranteed 40-hour workweek; 1-1/2 time for all hours worked between 6 p.m. and 7 a.m. and all Saturday work; double time for all Sunday work; a guarantee of 8 hours work of pay for all call-ins for Saturday and Sunday work; a premium of 22-1/2 cents per hour for all hours worked between 6 p.m. and 7 a.m.; two paid 15-minutes rest periods each 8-hour day and one for each 2 hours of overtime; reimbursement for lost wages if called for jury service or if a death occurred in the immediate family; seniority rights; and access to grievance-arbitration machinery over alleged contract breaches. The fringe benefits were valued by the company president and a representative of Local 174 at $2–$3 per hour.

Prior to the March 31, 1980 expiration date of the 1977–1980 agreement, Company President John R. Pankratz[2] informed Local 174 Business Representative Ted Keyes that the Company was experiencing economic difficulties due to a general slump in the forest products industry, and intense competition in the area, particularly from Hardwood Flooring Distributors;[3] complained the Company was severely handicapped in meeting the competition from that company because it was nonunion and its three drivers and warehousemen received much less in wages and fringe benefits;[4] and stated in view of those

[1] The agreement carried the caption "Private Carrier Agreement." It was a standard area agreement between certain employers in the Seattle area and Local 174 covering the wages, hours, and working conditions of Local 174-represented employees.

[2] The complaint alleges, the answer admits, and I find at all pertinent times Pankratz was an officer, agent, and supervisor of the Company acting on its behalf within the meaning of Sec. 2 of the Act.

[3] A rival company with virtually the same product line, competing in the same market, and formed by the Company's former sales manager, who knew most of the Company's customers.

[4] Pankratz testified Keyes investigated his complaint of low wages and benefits at Hardwood Flooring and advised him the three drivers and warehousemen employed by that company were averaging $6.91 per hour in wages and received no fringe benefits.

factors it would be difficult for the Company to enter into a new agreement supplanting the 1977–1980 agreement containing any new or increased wages or fringe benefits.

Neither party served a notice on the other prior to February 1, 1980, terminating the 1977–1980 agreement so the terms of the 1977–1980 agreement were extended, unchanged, to March 31, 1981, and the wages, hours, and working conditions of the three Local 174-represented employees of the Company were continued in effect, unchanged, for that period.

In late 1980, Local 174 requested the Company meet with it to negotiate modifications of the 1977–1980 agreement, as extended to March 31, 1981. At the initial meetings pursuant to that request (in October or early November), Local 174 proposed increases in wages and fringe benefit contributions.

The Company responded with proposals: (1) the terms of the 1977–1980 agreement be extended, unchanged, for an additional year (to March 31, 1982), except for (2) an amendment to section 9.01, to permit the Company to assign bargaining unit work to nonbargaining unit employees[5] and (3) its contribution to the pension plan be increased by 7 cents per hour.

Following receipt of the Company's counterproposal, Local 174 reviewed the situation with its three members employed by the Company and took a vote among them; they voted to reject the Company's counterproposal and authorized Local 174 to call a strike in support of its demands when and if it considered strike action appropriate.

On learning of the employee action, the Company (through its attorney, Paul D. Carey) asked Keyes if and when Local 174 was going to call a strike. Keyes responded it was not Local 174's practice to advise employers when it was going to call a strike and that Local 174 would not call the Company's employees out on strike unless it was absolutely necessary.

On December 24, 1980, the Company advised Local 174 that, due to its continuing losses in that part of its operations,[6] it was going to lay off the junior of the three Local 174-represented employees (Terry Swenson), it was withdrawing its offer to increase its contribution to the pension plan, and it renewed its proposals that the terms of the 1977–1980 agreement be extended, unchanged, for an additional year to March 31, 1982, and section 9.01 of the agreement be amended to permit the Company to assign nonbargaining unit employees to perform bargaining unit work.

Swenson was laid off on December 26, 1980; from that date on, the Company assigned bargaining unit work to its nonbargaining unit employees.[7]

As in 1980, neither party served a notice of contract termination notice on the other by February 1, 1981, automatically extending the terms of the 1977–1980 agreement to March 31, 1982, subject to such modifications as the parties might mutually agree upon.[8]

The parties met in mid-February 1981 to discuss possible contract modification; on February 10, 1981, the Company changed its earlier position, proposing the agreement be revised to: (1) establish a classification of leadman and placement of the senior driver/warehouseman—Alfred Galliano—in that classification at the rate of pay and benefit levels he was receiving under the terms of the agreement, as extended; (2) on Galliano's quit, retirement, or termination, the leadman classification be abolished, as well as the rate of pay and benefit levels Galliano was receiving at that time; (3) Swenson's rate of pay and benefits be reduced so his total remuneration would not exceed $7 per hour;[9] (4) any new hires receive the same total pay package as Swenson; (5) "several other changes in contract language" (presumably referring to the earlier company proposal for modifying sec. 9.01 to sanction and permit the expansion of the Company's practice, beginning in December 1980 of assigning bargaining unit work to nonunit employees); and (6) a contract duration of 3 years for the proposed revisions and those portions of the 1977–1980 agreement unaffected thereby.

Local 174 countered by withdrawing its proposals for any increased wages or benefits and accepting the earlier company proposal for extension of the terms of the 1977–1980 agreement for another year, to March 31, 1982 (an accomplished fact, since neither party terminated the extended agreement by timely notice on the other between January 1 and February 1, 1981), discussing possible substitution by the parties of Local 174's standard area lumber agreement (it was estimated the average hourly costs per employee under that agreement were approximately $1 per hour less than those of the standard area private carrier agreement currently in effect); and discussing other possible contract modifications to lower the Company's labor costs. Throughout the meeting Local 174 protested, and expressed its opposition to, the Company's current, and any future, use of nonunit employees to perform bargaining unit work.

During the last (February 17) face-to-face meeting between the parties (at which the exchanges described above took place), the parties failed to reach agreement to any modification of the terms of the 1977–1980 agreement, as extended.

On February 19, 1981, the Company unilaterally declared a bargaining impasse[10] and announced it was

[5] That section provided that: "The work of Local No. 174's bargaining unit must be performed only by employees belonging to said unit."

[6] The Company suffered a loss in its operations at Kelly-Goodwin during the quarter ending March 31, 1980, and in each quarter thereafter through the quarter ending March 31, 1982 (the last quarter for which data was submitted).

[7] Pankratz so conceded. Local 174 filed a grievance alleging the Company was violating sec. 9.01 of the contract by such assignment.

[8] Cf. *KCW Furniture Co.*, 247 NLRB 541 (1980), affd. 634 F.2d 436 (9th Cir. 1980); *Lifetime Shingle Co.*, 203 NLRB 688 (1973).

[9] The third driver/warehouseman represented by Local 174 left the Company's employ in January 1981; Swenson was recalled to replace him.

[10] I find no impasse was established by the evidence; as noted above, at the face-to-face meeting immediately preceding the unilateral declaration, Local 174 modified its bargaining stance to accept a preceding company offer of no increases for 1 year and discussed other lower-cost modifications of the extended agreement (such as adoption of the stand-

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going to place its proposed February 10, 1981 contract modifications in effect on March 2, 1981.

On March 2, 1981, however, the Company did not carry out its announced plan;[11] instead, Pankratz advised Galliano and Swenson, when they reported for work, that their services were no longer desired or required, and put to work three new employees Pankratz had standing by at their work, at rates of $6.80, $7.25, and $8. per hour, with no fringe benefits.

The Company failed to notify and give appropriate mediation agencies any opportunity to enter the dispute at any time prior to its March 2 action.

Galliano and Swenson advised Local 174 what had transpired; on March 11, 1981, the two (through Local 174) unconditionally offered to report for work. Their offers were ignored; they never have been recalled.

On March 13, Local 174 filed its initial charge in this case. That charge alleged the Company violated the Act by its March 2 termination of Galliano and Swenson's employment and repudiation of the currently effective Company-Local 174 agreement. The charge contained the usual catchall language, i.e., by those "and other acts" the Company violated the Act.

On September 9, 1981, Local 174 filed an amendment to its March 13, 1981 charge alleging the Company violated the Act by the actions asserted in its March 13, 1981 charge and by the fact the wages it paid the replacements not only were lower than those required under the contract, they exceeded the wages offered to Swenson and any new hires, in the negotiations preceding Galliano and Swenson's dismissal and the hire of replacements to perform their work.

By timely notice filed in early 1982, the Company terminated the 1977–1980 Company-Local 174 agreement, as extended, effective March 31, 1982.

B. *Analysis and Conclusions*

1. The 10(b) issue

Section 10(b) of the Act has been liberally interpreted and applied by the Board and reviewing courts; i.e., they repeatedly have rejected challenges to unfair labor practice findings based on complaint allegations which allegedly varied from those set out in the underlying charges, so long as the complaint allegations not detailed in the underlying charges were "related to those alleged in the charge and grew out of them."[12]

In this case, the original, timely (March 13) charge in essence alleged the Company violated the Act by terminating its Local 174-represented employees covered by a current agreement and by repudiating that contract (as evidenced by its hire of nonunion replacements at wages, rates of pay, hours, and working conditions substantially below those set out in that agreement).

That charge clearly encompassed the hire, and the term for the hire, of the replacements; thus the allegation in the complaint that their hire, at rates of pay below those specified in the contract, was violative of the Act, particularly so since those rates exceeded those contained in the Company's last wage offer for Swenson and any new hires, "related to," and "grew out of," the allegations of the original charge alleged "by other acts" than those specified in detail in the charge, the Company violated the Act.

Thus on the ground the complaint allegation the Company violated the Act by its hire and payment to replacements of wage rates lower than those set out in the agreement and higher than those it offered Swenson and any new hires in negotiations preceding Galliano and Swenson's termination were related to and grew out of the original charge and, in any event, were encompassed by the catchall provision of that charge, I dismiss the Company's motion to dismiss the complaint on 10(b) grounds.

2. The replacement and payment issues

On the basis of the facts recited above, I find and conclude the Company dismissed Galliano and Swenson on March 2, 1981, to evade the obligations of the Company-Local 174 agreement and establish a nonunion operation, thereby violating Section 8(a)(1) and (3) of the Act.

Faced with the fact the agreement was going to remain in effect until March 31, 1982, a pending grievance over its use of nonunit employees to perform bargaining unit work, and in retaliation for Local 174's refusal to wipe out its pending grievance by modifying the agreement to sanction and expand the Company's practice of utilizing non-unit employees to perform bargaining unit work, to red-circle Galliano's wages and benefits, and to cut the total compensation of Swenson and any newly hired driver/warehousemen in half, I find and conclude the Company dismissed Galliano and Swenson and simultaneously hired new employees to perform their work to rid itself of the obligation to pay its veteran union-supporting help the wage rates and benefits to which they were entitled under the extended agreement, any necessity to continue dealing with Local 174 as their representative, and in order to establish a nonunion operation at far lower scales than those it was required to pay through March 31, 1982, under the union agreement.

I base this motivation finding on the following factors: its escalation of its contract proposals from continuation of the terms of the 1977–1980 agreement through March 31, 1982, to a proposal, *after that extension became an accomplished fact*, to a proposal to cut Swenson and any future hires to one-half of the contract levels, a proposal it had to be aware Local 174 never would accept (since the agreement already automatically was extended for an additional year, at its current levels); its February 19 notice it was going to place its February 10 contract proposals in effect on March 2 in apparent pique over Local 174's refusal to accept its proposed modifications in full; its failure to explore and develop compromises suggested

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ard area lumber agreement). The record does not indicate these avenues were fully explored and developed prior to the issuance of the unilateral declaration.

[11] Apparently recognizing the illegality thereof in view of the fact the contract was in full force and effect.

[12] *National Licorice Co. v. NLRB*, 309 U.S. 369 (1940); *NLRB v. Fant Milling*, 360 U.S. 301 (1959); *NLRB v. Kiekhaefer Corp.*, 292 F.2d 130 (7th Cir. 1961); *NLRB v. Reliance Steel Products*, 322 F.2d 49 (5th Cir. 1963); *NLRB v. Texas, Inc.*, 336 F.2d 128 (5th Cir. 1964); *NLRB v. Operating Engineers Local 925*, 460 F.2d 589 (5th Cir. 1974); *NLRB v. Quality Transport*, 511 F.2d 1190 (5th Cir. 1975).

on February 17 before announcing that unilateral declaration; its failure to desist from any economic action, as required by the termination provision of the agreement, to March 31, 1981; its deviation on March 2 from its announced plans for modification in Galliano and Swenson's employment conditions to their sudden dismissal, without any prior discussion with Local 174 (apparently because it realized a unilateral reduction in Galliano and Swenson's wages and benefits below those set out in the agreement would be unlawful); its immediate assignment of employees (who obviously were previously hired and standing by) to perform the bargaining unit work previously performed by Galliano, Swenson, and nonunit employees at a fraction of the wage rates and benefit payments received by Galliano and Swenson but, in two cases, at wage scales which exceeded those offered to Swenson and any newly hired driver/warehousemen; and its rejection of Galliano and Swenson's unconditional offers to report for work, despite constant turnover of employees hired to perform their work.

Both the Board and reviewing courts have held an employer's attempt to rid itself of the obligations stemming from a union contract, by dismissing its union-supporting employees and replacing them with nonunion personnel at lower rates of pay, etc., than those established by the contract, constitutes a violation of Section 8(a)(1) and (3) of the Act, in several cases rejecting or finding inapplicable lockout and economic justification defenses.[13]

The inapplicability of the line of lockout defense cases cited by the Company[14] is readily apparent here; those cases involved lockouts following the expiration of a collective-bargaining agreement and service of applicable 8(d) notices, negotiation to a genuine impasse, and threat of an imminent strike and serious disruption of operations, and were *solely* to pressure the involved union and its members to modify new contract demands. Here, on the contrary, the Company-Local 174 agreement not only had not expired, it automatically had been extended for an additional year; there was no genuine impasse in negotiations; there was no immediate threat of a disruption in operations or a strike (to the contrary, Local 174 in the final (February 17) meeting expressed its willingness to live with the terms of the 1977–1980 agreement for another year, as the Company had earlier proposed); there were no standby replacements hired at below-contract and above-wage offer levels; the lockout and replacements were instituted in retaliation for Local 174's refusal to yield on February 17 to the Company's demands and to rid itself of its obligation vis-a-vis its Local 174-represented employees and Local 174 under that agreement; and he dismissed Local 174 members' unconditional offer to work was ignored throughout the remaining term of the contract to its termination date of March 31, 1982.

It is undisputed the Company's last wage offer to Local 174, in the negotiations immediately preceding Galliano and Swenson's dismissal, was for payment to Swenson and any newly hired driver/warehouseman of a wage package (including both direct wages and fringe benefits) not exceeding $7 per hour.

Findings have been entered that two of the standby replacements hired by the Company to perform bargaining unit work on March 2, 1981 were paid wage rates of $7.25 and $8 per hour, respectively. Those payments, which exceeded the Company's last offer to Swenson prior to dismissing him, together with its dismissal rather than continued payment to Swenson of his contract scales, certainly had the effect of discouraging Swenson's continued support of Local 174, thereby further violating Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. At all pertinent times the Company was an employer engaged in commerce in a business affecting commerce and Local 174 was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Pankratz was an officer, supervisor, and agent of the Company acting on its behalf within the meaning of Section 2 of the Act.

3. None of the allegations of the complaint was or is time-barred within the meaning of Section 10(b) of the Act.

4. The Company violated Section 8(a)(1) and (3) of the Act by its March 2, 1981 dismissal of Alfred Galliano and Terry Swenson and hire of replacements therefor at wages, rates of pay, hours, and working conditions lower than those set forth in the then current agreement between the Company and Local 174 and higher than those contained in its last wage offer pertaining to Swenson preceding their dismissal.

5. The aforesaid unfair labor practices affected commerce as defined in the Act.

THE REMEDY

Having found the Company engaged in unfair labor practices in violation of the Act, I recommend the Company be directed to cease and desist therefrom and take affirmative action designed to effectuate the purposes of the Act. Having found the Company dismissed Alfred Galliano and Terry Swenson and hired their replacements to discourage their continued membership in and support of Local 174, I recommend the Company be directed to offer Galliano and Swenson reinstatement to their former positions, if necessary terminating the employees hired to replace them, and to make them whole for any losses in wages and benefits they suffered by virtue of the discrimination against them, with the amounts due calculated in the manner set out in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest there-

[13] *Universal Marine Corp.*, 246 NLRB 445 (1979); *Mission Marine Assn.*, 235 NLRB 720 (1978), affd. 602 F.2d 1302 (9th Cir. 1979); *Alcan Forwarding Co.*, 235 NLRB 994 (1978); *J. D. Industrial Insulation Co.*, 234 NLRB 163 (1978), affd. 615 F.2d 1289 (10th Cir. 1980); *Fimbel Door Co.*, 224 NLRB 703 (1976); *Lifetime Shingle Co.*, 203 NLRB 688 (1973); also see *Eastern Market Beef Processing Corp.*, 259 NLRB 102 (1981); *Whitehall Packing Co.*, 257 NLRB 193 (1981); *Vore Cinema Corp.*, 254 NLRB 1288 (1981); *J. M. Tanaka Co.*, 249 NLRB 238 (1980), affd. 675 F.2d 1029 (9th Cir. 1982); *Mar-Len Cabinets*, 243 NLRB 523 (1979), affd. 659 F.2d 995 (9th Cir. 1982); *Strand Theatre*, 235 NLRB 1500 (1978); *Romo Paper Products Corp.*, 208 NLRB 644 (1974); *Milwaukee Spring Division*, 265 NLRB 206 (1982).

[14] *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *Loomis Courier Services v. NLRB*, 595 F.2d 491 (9th Cir. 1979); *Inter-Collegiate Press v. NLRB*, 486 F.2d 837 (8th Cir. 1973); and *Ottawa Silica Co.*, 197 NLRB 449 (1972).

on computed in accordance with the formula set out in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]